IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**RULING: DEFENSE MOTION**
v.	)	**TO COMPEL DISCOVERY**
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company,	)	
U.S. Army Garrison, Joint Base Myer-	)	DATED: 23 March 2012
Henderson Hall, Fort Myer, VA 22211	)	

Defense moves the Court to compel discovery. Government opposes. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Factual Findings:

1. In its Motion of 14 February 2012, the Defense moved the Court to compel the following discovery from the Government IAW RCM 701(a)(2) (Documents, tangible objects, and reports within the possession, custody, or control of military authorities that is material to the preparation of tbe defense), 701(a)(5)(Information to be offered by the Government at Sentencing), 705(a)(6)(Evidence favorable to the Defense) and 906(b)(7)(Motion for Appropriate Relief regarding discovery and production of evidence). The Government response is listed below each item:

a. FOIA Requests Regarding Video in Specification 2 of Charge II: A copy of any Freedom of Information Act (FOIA) request and any response or internal discussions of any such FOIA request that is related to the video that is the subject of Specification 2 of Charge II.

Government Response: On 3 October 2011, the Government produced all enclosures to any Freedom of Information Act (FOIA) response, specifically BATES 00000772-00000851. On 15 March 2012, the Government advised the Court it had given the Defense the information requested.

b. Quantico Video: The video of PFC Manning being ordered to surrender his clothing at the direction of CW4 James Averhart and his subsequent interrogation by CW4 Averhart on 18 January 2011. The Defense filed a preservation of evidence request over one year ago, on 19 January 2011 for this information. The Defense alleges the Government produced the video of PFC Manning being ordered to surrender his clothing, but not the video of the subsequent interrogation by CW4 Averhart. The Defense alerted the Government to the need to locate the additional video in a telephone conversation on 12 December 2011. The Defense proffered that the requested video is relevant to support the accused's claim of unlawful pretrial punishment. The Defense presented no evidence that the video exists.

Government Response: Upon Defense request, the United States promptly preserved all Quantico videos requested by Defense. On 6 December 2011, the United States produced all videos of the alleged Quantico incident, specifically BATES 00408902 00408903. The alleged video referenced by the Defense does not exist.

In an email to the Court dated 20 March 2012, the Defense accepted Trial Counsel's representation that the Government has provided the Defense with all videos provided to the Government by Quantico.

c. EnCase Forensic Images: An Encase forensic image of each computer from the Tactical Sensitive Compartmented Information Facility (T SCIF) and the Tactical Operations Center (TOC) of Headquarters and Headquarters Company (HHC), 2nd Brigade Combat Team (BCT), 10th Mountain Division, Forward Operating Base (FOB) Hammer, Iraq. On 30 September 2010 CID requested preservation of hard drives used during the 2d BCT deployment to Iraq. The Defense submitted a preservation request for this evidence on 21 September 2011.

Government Response: On 21 September 2011 – more than one year after the accused's unit redeployed back to Fort Drum, New York – the Defense requested that the United States preserve these hard drives. The Government identified four commands or agencies that may possess hard drives responsive to this request and submitted a Request to Locate and Preserve Evidence to each command or agency. Those entities included: (1) 2d Brigade Combat Team, 10th Mountain Division (2/10 MTN); (2) the Federal Bureau of Investigation (FBI); (3) Third Army, United States Army Central (ARCENT); and (4) the Computer Crime Investigative Unit, U.S. Army Criminal Investigative Command (CCIU). The Government request to 2/10 MTN yielded the preservation of 181 hard drives, of which the United States has identified thirteen as being located within the SCIF during the unit's deployment to FOB Hammer. None of those thirteen hard drives contained the "bradley.manning" user profile. At the Article 39(a) session on 15 March 2012, the Government advised there were 14 hard drives responsive to the Defense discovery request. The Government argues the hard drives are not relevant and necessary for the Defense under RCM 703(f) and that, because they are classified, the rules of production under MRE 505 should govern whether the images are discoverable.

d. Damage Assessments and Closely Aligned Investigations: The following damage assessments and records from closely aligned investigations:

(1) Central Intelligence Agency: Any report completed by the WL Taskforce (WTF) and any report generated by the WTF under the direction of former Director Leon Panetta.

(2) Department of Defense: The damage assessment completed by the Information Review Task Force (IRTF) and any report generated by the IRTF under the guidance and direction of former Secretary of Defense Robert Gates. Additionally, the Defense requests all forensic results and investigative reports by any of the cooperating agencies in this investigation (DOS, FBI, DIA, the Office of the National Counterintelligence Executive (ONCIX), and the CIA).

(3) Department of Justice: Any documentation related to the DOJ investigation into the disclosures by WikiLeaks concerning PFC Bradley Manning, including any grand jury testimony or any information relating to any 18 U.S.C. § 2703(d) order or any search warrant by the government of Twitter, Facebook, Google or any other social media site.

(4) Department of State: The damage assessment completed by the DOS, any report generated by the task force assigned to review each released diplomatic cable, and any report or assessment by the DOS concerning the released diplomatic cables.

Government Response: The Government intends to disclose all relevant and necessary classified and unclassified grand jury testimony that the Government is authorized under the federal rules to the Defense. The Government: (1) confirms the existence of completed WTF and IRTF damage assessments; (2) confirms the existence of a damage assessment by DOS that is not complete; and (3) denies that ONCIX has produced an interim or final damage assessment. At the Article 39(a) session on 15 March 2012, the Government stated that it had no authority to disclose or discuss the requested damage assessments. The Government argues that Defense has not demonstrated that the damage assessments are relevant and necessary to an element of the offense or a legally cognizable defense and otherwise inadmissible in evidence under RCM 703(f) because the Defense is confusing prospective OCA classifications determinations assessing whether damage could occur (relevant to elements of charged offenses) with hindsight damage assessments determining what damage did occur (not relevant to elements of charged offenses). The Government further responded that it is unaware of any forensic results and investigative reports from within the DOS, FBI, DIA, ONCIX, or the CIA, that contributed to any law enforcement investigation.

2. The accused is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010).

3. The Defense Motion to Compel the EnCase Forensic Images, the damage assessments from WTF, IRTF, and DOS, and forensic and investigative reports from DOS, FBI, DIA, ONCIX, or the CIA remain at issue.

4. The Defense submitted the following proffers of relevance and evidence in support of its Motion to Compel:

EnCase Forensic Images: The Defense requested an EnCase forensic image of each computer from the T-SCIF and the TOC of Headquarters and Headquarter Company, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, Iraq.

a. **Proffer of relevance:** The Defense proffers that an EnCase Image would allow its forensic expert to inspect the 14 seized government computers from the T-SCIF and TOC. Such inspection would allow the Defense to discover whether it was common for Soldiers to add

technically unauthorized computer programs to their computers and that the practice of the unit was to tacitly authorize that addition of unauthorized programs including but not limited to: mIRC (a full featured Internet Relay Chat client for Windows that can be used to communicate, share, play or work with others on IRC networks); Wget (a web crawler program designed for robustness over slow or unstable network connections); GEOTRANS (an application program which allows a user to easily convert geographic coordinates among a wide variety of coordinate systems, map projections and datums); and Grid Extractor (a binary executable capable of extracting MGRS grids from multiple free text documents and importing them into a Microsoft Excel spreadsheet) to their computers. The Defense argues this information is relevant because the Government has charged PFC Manning with adding unauthorized software to his government computer in Specifications 2 and 3 of Charge III. The information is relevant to establish the defense theory that the addition of software not on the approved list of authorized software was authorized by the accused's chain of command through the practice of condoning and implicitly or explicitly approving the additions of such software.

b. **Evidence:** The Defense has provided the Court with a summary of what the defense asserts the following witnesses deployed with the accused testified to at the Article 32 investigation:

CPT Steven Lim – Soldiers listened to music and watched movies on their computers and saved music, movies, and games (unauthorized software).

CPT Casey Fulton – Soldiers saved music games, and computers to their computers. She added M-IRC Chat and Google Earth to her computer.

Mr. Jason Milliman – Soldiers added unauthorized games and music to their computers and was aware Soldiers were adding unauthorized software to their computers, although he did not believe the practice was common.

CPT Thomas Cherepko He saw unauthorized music, movies, games, and unauthorized programs improperly stored on the T-Drive. He advised his immediate supervisor and the Brigade Executive Officer concerning the presence of unauthorized media on the T-Drive. Nothing was done.

Ms. Jihrleah Showman – She and everyone else in the unit viewed M-IRC Chat as mission essential and everyone put it on their computers.

Damage Assessments and Closely Aligned Investigations: The Defense requested the following damage assessments and records from closely aligned investigations:

(1) **Central Intelligence Agency**: Any report completed by the WTF and any report generated by the WTF under the direction of former Director Leon Panetta.

(2) **Department of Defense:** The damage assessment completed by the Information Review Task Force (IRTF) and any report generated by the IRTF under the guidance and direction of former Secretary of State Robert Gates. Additionally, the Defense requests all forensic results and investigative reports by any of the cooperating agencies in this investigation (DOS, FBI, DIA, the Office of the national Counterintelligence Executive and the CIA).

(3) **Department of Justice:** The DOJ has conducted an investigation into the disclosures by WikiLeaks as referenced by Attorney General of the United States Eric H. Holder. The

Defense requested any grand jury testimony and any information relating to any 18 U.S.C. § 2703(d) order or any search warrant by the government of Twitter, Facebook, Google or any other social media site that was relevant to PFC Bradley Manning.

(4) **Department of State:** The DOS formed a task force of over 120 individuals to review each released diplomatic cable. The task force conducted a damage assessment of the leaked cables and concluded that the information leaked either represented low-level opinions or was already commonly known due to previous public disclosures.

Proffer of Relevance for all Damage Reports: The Defense argues that evidence of damage assessments (whether favorable or not) are material to the preparation of the defense for the merits and sentencing IAW RCM 701(a)(2) and that, if the damage assessments are favorable, they are also relevant, helpful to the defense, and discoverable under RCM 701(a)(6) and *Brady v. Maryland*, 373 U.S. 83 (1963). Even if the extent of actual damage caused by the alleged leaks was not relevant to the merits, it is relevant discovery for the defense to prepare its presentencing case.

Evidence: The Defense provided its 30 November 2011, request to the Article 32 Investigation Officer (IO) for the production of evidence to include the damage assessments. That request includes the following:

a. 5 August 2010 creating the IRFT and 16 August 2010 letter from former Defense Secretary Robert Gates to Senator Carl Levin discussing the IRTF.

b. 8 November 2010 message from former CIA Director, Leon Panetta to CIA employees advising them that the Office of Security is directed to fully investigate the damage from WL. 22 December 2010 Washington Post article stating that the CIA established the WTF to assess the impact of exposure of thousands of leaked diplomatic cables.

c. 18 January 2011 Reuters article stating "Internal U.S. government reviews have determined that a mass leak of diplomatic cables caused only limited damage to U.S. interests abroad, despite the Obama administration's public statements to the contrary". The article listed the sources as two congressional aides familiar with briefings by State Department officials and Congress. The article further went on to state "National security officials familiar with the damage assessments being conducted by defense and intelligence agencies told Reuters the reviews so far have shown "pockets" of short-term damage, some of it potentially harmful. Long term damage to U.S. intelligence and defense operations, however, is unlikely to be serious, they said." And "But current and former intelligence officials note that while WL has released a handful of inconsequential CIA analytical reports, the website has made public few if any real intelligence secrets, including reports from undercover agents or ultra-sensitive technical intelligence reports, such as spy satellite pictures or communications intercepts."

All forensic results and investigative reports by any of the cooperating agencies in this investigation (DOS, FBI, DIA, the Office of the national Counterintelligence Executive and the CIA).

Proffer of relevance: None
Evidence: None

5. The Defense filed discovery requests for the EnCase Images, damage assessments, and forensic results and investigative reports by any of the cooperating agencies in the investigation. On 13 October 2011, the Defense made a specific request for *Brady* material, identifying the damage assessments. On 30 November 2011, the Government responded to the requests for the damage assessments under *Brady* that the Government has no knowledge of any *Brady* material in the possession of the CIA, Department of Defense, Department of Justice, or the Department of States, and it would furnish such records if it became aware of them and that the Government did not have authority to disclose the damage assessments. At or near 15 December 2011, the Government advised the Article 32 IO that the damage assessments were classified, that the Government does not have to discuss the substance of the damage reports, and that all but the IRTF are not under the control of military authorities. On 31 January 2012, the Government responded to Defense Discovery Requests for damage assessments stating it would not provide the damage requests because the defense failed to provide an adequate basis for its request and that the Defense was invited to renew its request with more specificity and an adequate basis for the request.

6. On 21 March 2015, the Court required the Government to respond to the following factual questions regarding each of the requested damage assessments. The Government response follows the question.

QUESTIONS:

1. Is each in the possession, custody, or control of military authorities?
Government Response: -

a. Defense Intelligence Agency (DIA) and the Information Review Task Force (IRTF)- Yes, the classified document itself is in the possession of military authorities (DIA); however, the document contains material from other Agencies and Departments outside the control of military authorities. The military controls the document itself, but not all the information within its four corners.

b. Wikileaks Task Force (WTF)- No.

c. Department of State (DOS) -DOS has not completed a damage assessment.

d. Office of the National Counterintelligence Executive (ONCIX)- ONCIX has not produced any interim or final damage assessments in this matter.

2. If no, what agency has custody of each of the damage assessments?
Government Response:
WTF - The Central Intelligence Agency has possession, custody, and control.

3. Does the Prosecution have access to the damage assessments?
Government Response:

a. DIA and IRTF- The prosecution was given limited access for the purpose of reviewing for any discoverable material. The prosecution only has control of the information within the document that is owned by the Department of Defense (military authority).

b. WTF - The prosecution was given very limited access for the purpose of reviewing for preparation of the previous motions hearing. The prosecution will have future access to complete a full review for *Brady* material, as outlined below.

4. Has the Prosecution examined each of the damage assessments for Brady material?

Government Response:

a. DIA and IRTF- Yes.

b. WTF -No.

4a. If yes, is there any favorable material?

Government Response:

DIA and IRTF- Yes; however, the United States has only found classified information that is "favorable to [the] accused that is material... to punishment." *Cone v. Bell*, 129 S.Ct. 1769, 1772 (2009); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1973). The United States has not found any favorable material relevant to findings.

4b. If no, why not?

Government Response:

WTF- The prosecution has only conducted a cursory review of the damage assessment in order to understand what information exists within the Agency, and has not conducted a detailed review for *Brady* material. This process is ongoing and the prosecution will produce all "evidence favorable to [the]accused that is material to guilt or to punishment[]" if it exists, under the procedures outlined in MRE 505, *Cone v. Bell*, 129 S.Ct. at 1772; see also *Brady v. Maryland,* 373 U.S. at 87. Additionally, the United States is concurrently working with other Federal Organizations which we have a good faith basis to believe may possess damage assessments or impact statements, and will make such discoverable information available to the defense under MRE 505.

END OF QUESTIONS

7. No head of an executive or military department or government agency concerned has claimed a privilege to withhold classified information IAW MRE 505(c).

The Law:

1. Defense discovery in the military justice system is governed by the Constitutional standards set forth by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) and recently reaffirmed in *Smith v. Cain*, (slip opinion 10 January 2012), Article 46, UCMJ (Opportunity to Obtain Witnesses and Other Evidence), RCM 701 (Discovery), and, also, by RCM 703 (Production of Evidence) when the requested discovery is evidence not under the control of military authorities. For classified information, where the Government voluntarily agrees to disclose classified information in whole or in limited part to the accused, the provisions of MRE 505(g) apply. Where the Government seeks to use MRE 505 to withhold classified information, a privilege must be claimed IAW MRE 505(c). *U.S. v. Schmidt,* 60 M.J. 1 (C.A.A.F. 2004).

2. *Brady* requires the Government to disclose evidence that is favorable to the defense and material to guilt or punishment. Favorable evidence is exculpatory and impeachment evidence.

Brady applies to classified information. The Government must either disclose evidence that is favorable to the defense and material to guilt or punishment, seek limited disclosure IAW MRE 505(g)(2), or invoke the privilege for classified information under MRE 505(c) and follow the procedures under MRE 505(f) and (i). The classified information privilege under MRE 505 does not negate the Government's duty to disclose information favorable to the defense and material to punishment under *Brady*. The Government may provide the information to the Court and move for limited disclosure IAW MRE 505(g)(2). If the privilege is claimed, MRE 505(i) allows the Government to propose alternatives to full disclosure.[1]

3. Trial Counsel have a due diligence duty to review the files of others acting on the Government's behalf in the case for favorable evidence material to guilt or punishment. The scope of *Brady* due diligence is to examine files beyond the Trial Counsel's files is limited to:

(1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offense;
(2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and
(3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity.

For relevant files known to be under the control of another governmental entity, Trial Counsel must make that fact known to the Defense and engage in good faith efforts to obtain the material. *U.S. v. Williams*, 50 M.J. 436 (C.A.A.F 1999).

4. Article 46, UCMJ (Opportunity to obtain witnesses and other evidence) provides in relevant part that trial counsel, defense counsel and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

5. The President promulgated RCM 701 to govern discovery and RCM 703 to govern evidence production. The rules work together when production of evidence not in the control of military authorities is relevant and necessary for discovery. *U.S. v. Graner,* 69 MJ 104 (C.A.A.F. 2010). The requirements for discovery and production of evidence are the same for classified and unclassified information under RCM 701 and 703 unless the Government moves for limited disclosure under MRE 505(g)(2) or claims the MRE 505 privilege for classified information. If the Government voluntarily discloses classified information to the defense, the protective order and limited disclosure provisions of RCM 505(g) apply. If, after referral, the Government invokes the classified information privilege, the procedures of RCM 505(f) and (i) apply.

6. Relevant discovery rules in RCM 701(Discovery) are:

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[1] The parties have not presented the Court with any military cases directly on point. *Cone v. Bell,* 556 U.S. 449 (2009) does not address classified information disclosures required by the Government under *Brady*. Federal courts using the Classified Information Procedures Act (CIPA) recognize that *Brady* requires disclosure of evidence by the prosecution when it is both favorable to the accused and material either to guilt or punishment. *See U.S. v. Hanna,* 661 F.3d 271 (6th Cir. 2011).

a. RCM 701(a)(2) (Documents, tangible objects, reports) governs defense requested discovery of evidence material to the preparation of the defense that is within the possession, custody, or control of military authorities, whose existence is know or by due diligence should be known by the Trial Counsel. The rule provides for such discovery after service of charges upon the accused.

b. RCM 701(a)(6) (Evidence favorable to the defense) codifies *Brady* and provides that the trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence know to the trial counsel which reasonably tends to: (A) negate the guilt of the accused to an offense charged; (B) reduce the degree of guilt of the accused of an offense charged; or (C) reduce the punishment.

c. RCM 701(f) provides that nothing in RCM 701 shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. RCM 701(f) applies to discovery of classified information when the Government moves for limited disclosure under MRE 505(g)(2) of classified information subject to discovery IAW RCM 701 or when the Government claims a privilege under MRE 505(c) for classified information.

d. RCM 701(g) authorizes the military judge to regulate discovery. A military judge is not detailed to a court-martial until charges are referred for trial (Article 26(a) UCMJ).

7. RCM 703 (Production of Witnesses and Evidence) states in relevant part:

a. RCM 703(f)(1) provides that each party is entitled to the production of evidence which is relevant and necessary.

b. RCM 703(f)(4) provides that evidence under the control of the government may be obtained by notifying the custodian of the record of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence. The custodian of the evidence may request relief on the grounds that the order of production is unreasonable or oppressive. After referral, the military judge may direct that the subpoena or order of production be withdrawn or modified. Subject to MRE 505 (Classified Evidence), the military judge may direct that the evidence be submitted for an *in camera* inspection in order to determine whether relief should be granted.

8. Both the discovery rules under MRE 701 and the evidence production rules under MRE 703 are grounded in relevance. In order to have the military judge compel release of evidence either as discovery under MRE 701 or as evidence production under MRE 703, the Defense must establish that the evidence is relevant either to the merits or to sentencing, *U.S. v. Graner*, 69 MJ 104 (C.A.A.F. 2010).

9. Prior to referral, the Government may decline to disclose information requested by the Defense IAW RCM 701 where the Government contests relevance and materiality. After referral, RCM 701(g) empowers the military judge to deny or regulate discovery to include requiring the Government to produce the requested discovery for *in camera* review. RCM 701(g) does not require the Government to produce all discovery requested by the Defense to the

Court for *in camera* review. As in this case, where the Government withholds discovery, the Defense may move for a Motion for Appropriate Relief to Compel Discovery IAW RCM 906(b)(7) and, where classified information is withheld by the Government, IAW MRE 505(d). Upon such a motion and a sufficient showing by the Defense of relevance and materiality, the Court may require the evidence to be produced for *in camera* review.

10. If classified discovery is at issue and the government agrees to disclose classified information to the defense, the military judge shall enter an appropriate protective order if the government requests one IAW MRE 505(g)(1)or allow the Government to move for limited disclosure under MRE 505(g)(2).

11. If classified discovery detrimental to national security is at issue and the government does not wish to disclose the classified information in part or in whole to the defense, the government must claim a privilege under MRE 505(c). There is no privilege under MRE 505 for classified information unless the privilege is claimed by the head of the executive or military department or government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security.

12. MRE 505(e) (Pretrial Session) states in relevant part that after referral and prior to arraignment any party may move for a session under Article 39(a) to consider matters relating to classified information in connection with the trial. Following such a motion or *sua sponte* the military judge promptly shall hold a session to establish the timing of requests for discovery, the provision of notice under MRE 505(h), and the initiation of procedures under MRE 505(i). In addition the military judge may consider any matters that relate to classified information or that may promote a fair and expeditious trial.

Analysis:

1. No government entity in possession of any discovery at issue has claimed a privilege under MRE 505(c). Thus, *Brady,* RCM 701(a)(2), 701(a)(6), and 701(g) govern discovery of both classified and unclassified information. MRE 505(g) also applies when the Government voluntarily discloses classified information. RCM 703(f) requires that discovery of evidence outside the control of military authorities be relevant and necessary.

2. The 14 hard drives for which the EnCase Images are requested are within the possession, custody, or control of military authorities. Some of the information in the IRFT damage assessment is under the possession, custody, or control of military authorities. The DOS and WTF damage assessments are in the possession, custody, and control of the Department of State and the Central Intelligence Agency, respectively.

3. Because no privilege has been invoked under MRE 505(c) and the Government has not moved for limited disclosure IAW RCM 505(g)(2), RCM 701(f) does not preclude disclosure of classified information that is material to the preparation of the defense under RCM 701(a)(2) or classified information that is favorable to the defense under RCM 701(a)(6).

4. Under Brady and RCM 701(a)(6), the Government has a due diligence duty to search for evidence that is favorable to the defense and material to guilt or punishment. This includes a due diligence to search any damage assessment pertaining to the alleged leaks in this case made by the CIA, DoD, DOJ, and DOS. These agencies are entities closely aligned with the prosecution in this case. The Government must disclose any favorable classified information from the damage assessments that is material to punishment, move for limited disclosure under MRE 505(g)(2), or claim the privilege IAW MRE 505(c).

5. The Government has examined the IRTF damage assessment and has found information favorable to the accused that is material to punishment. The Court further finds that the IRTF damage assessment is relevant and necessary for discovery under *Brady* and RCM 701(a)(6).

6. The Court finds that the WTF and DOS damage assessments may contain evidence favorable to the accused that is material to punishment. The Court finds that these damage assessments are relevant and necessary for the Government to examine for *Brady* material.

7. The Court finds all 3 damage assessments relevant and necessary for the Court to conduct an *in camera* review to determine whether they contain information that is favorable to the accused and material to punishment under *Brady,* whether they contain information relevant and favorable to the accused under RCM 701(a)(6), and whether they contain information material to the preparation of the defense under RCM 701(a)(2).

8. The Government has advised the Court it is "unaware" of any forensic results or investigative files relevant to this case maintained by DOS, FBI, DIA, ONCIX, and CIA. These agencies are closely aligned to the Government in this case. The Government has a due diligence duty to determine whether such forensic results or investigative files that are germane to this case are maintained by these agencies. The Government will advise the Court whether they have contacted DOS, FBI, DIA, ONCIX, and CIA and that each of these agencies have stated to the government that no such forensic results or investigative files exist.

9. The Court finds that a complete search of the relevant 14 hard-drives of computers from the Tactical Sensitive Compartmented Information Facility (T-SCIF) and the Tactical Operations Center (TOC) of Headquarters and Headquarters Company (HHC), 2nd Brigade Combat Team (BCT), 10th Mountain Division, Forward Operating Base (FOB) Hammer, Iraq is not material to the preparation of the defense for specifications 2 and 3 of Charge III IAW RCM 701(a)(2). At least some of the information on the hard drives is classified. The witnesses at the Article 32 investigation testified that Soldiers would save unauthorized music, movies, games, and other programs such as Google Earth and M-IRC Chat. The Defense has evidence from the Article 32 witnesses to further the defense theory. Although a complete search is not material, the Court will direct the Government to search each of the 14 hard drives Wget, M-IRC Chat, Google Earth, movies, games, music, and any other specifically requested program from the Defense. The Government will disclose the results of the search to the Defense under MRE 701(g)(1) and 505(g)(2). The Defense may renew its Motion to Compel Encase Forensic Images after receipt of the results of the Government search.

RULING: The Defense Motion to Compel Discovery is **Granted in Part**.

ORDER:

1. The Government will **immediately** begin the process of producing the damage assessments that are outside the possession, custody, or control of military authorities IAW RCM 703(f)(4)(A). If necessary, the Government shall prepare an order for the Court to sign for each custodian.

2. The Government will **immediately** cause an inspection of the 14 hard drives as provided in paragraph (Analysis 9) above. On or before **30 March 2012,** Defense will provide a list of additional terms the Defense wants the Government to add to its search of the 14 hard drives. On or before **20 April 2012,** the Government will provide the results of the search.

3. The Government shall contact DOS, FBI, DIA, ONCIX, and CIA to determine whether these agencies contain any forensic results or investigative files relevant to this case. The Government will notify the court NLT **20 April 2012** whether any such files exist. If they do exist, the Government will examine them for evidence that is favorable to the accused and material to either guilt or punishment.

4. By **20 April 2012** the Government will notify the Court with a status of whether it anticipates any government entity that is the custodian of classified evidence that is the subject of the Defense Motion to Compel will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c) for the classification under that agency's control.

5. By **18 May 2012** the Government will disclose any unclassified information from the 3 damage assessments that is favorable to the accused and material to guilt or punishment and provide any additional unclassified information from the damage assessments to the Court for in camera review IAW RCM 701(g)(2).

6. By **18 May 2012** the Government will identify what classified information from the 3 damage reports it found that was favorable to the accused and material to guilt or punishment. By **18 May 2012** the Government will disclose all classified information from the 3 damage assessments to the Court for *in camera review* IAW RCM 701(g)(2) or, at the request of the Government, *in camera review* for limited disclosure under MRE 505(g)(2). By **18 May 2012,** if the relevant Government agency claims a privilege under MRE 505(c) and the Government seeks an *in camera* proceeding under MRE 505(i), the Government will move for an *in camera* proceeding IAW MRE 505(i)(2) and (3) and provide notice to the Defense under MRE 5054(A).

So **ORDERED**: this 23rd day of March 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit